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DEC 21, 2016
Court of Appeals
Division III
State of Washington

34359-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JERRY DALE HUNTOON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The superior court of Spokane County, State of Washington, erred in criminal cause no. 14-1-03131-0, on January 26, 2016, when denying, by way of oral ruling, the defendant's motion to suppress for lack of probable cause to arrest [CP 15, 16-20] which was filed by defendant, JERRY DALE HUNTOON, on October 28, 2015. [RP 54-55].

2. The superior court of Spokane County, State of Washington, also erred on March 18, 2016, in criminal cause no. 14-1-03131-0, when instructing the jury in instruction no. 6 that "[t]o return a verdict of guilty, the jury need not be unanimous as to which of [the] alternatives ... [corresponding to RCW 46.61.502(1)(a) and (1)(b)] ... has been proved beyond a reasonable doubt, as long as each juror finds at least one alternative ... has been proved beyond a reasonable doubt." [RP 390-90; CP 65].

3. Finally, the superior court of Spokane County, State of Washington, erred on March 18, 2016, in criminal cause no. 14-1-03131-0, when accepting the jury verdict of guilty [CP 73] as to count I concerning the violation of RCW 46.61.502(1)(a) and (1)(b), as well as (6), and then entering its "Felony Judgment and Sentence," "Warrant of Commitment," and other related final decisions of the court, as against the defendant, JERRY DALE HUNTOON. [RP 479-83; CP 83, 84-97, 98-99, 100-01].

II. ISSUES PRESENTED

1. Whether probable cause existed for law enforcement to arrest the defendant for the crime of driving under the influence?

2. Whether the evidence was sufficient for the jury to find that the defendant was affected to an appreciable degree by his alcohol consumption such that the jury was not required to be unanimous as to which alternative means of DUI it found beyond a reasonable doubt?

III. STATEMENT OF THE CASE

The defendant, Jerry Huntoon, was charged in Spokane Superior Court with one count of felony driving under the influence of intoxicating liquor, as well as driving with license suspended in the first degree and operating a motor vehicle without an ignition interlock.¹ CP 11-12. The amended information charged the defendant with the crime of DUI by means of (1) having a blood or breath alcohol concentration of .08 or higher and/or (2) while under the influence of affected by intoxicating liquor or any drug. CP 11; *see also* RCW 46.61.502(1)(a) and (1)(c).

On the day of trial, the trial court heard the defendant's motion to suppress brought pursuant to CrR 3.6, in which the defendant alleged that

¹ The defendant pled guilty to the Driving with License Suspended charge and Ignition Interlock Violation prior to trial. CP 261-281.

there was insufficient probable cause for the arresting officer to believe that he was driving under the influence. CP 16-20.

At the motion hearing, Trooper Bart testified that he has been a commissioned state trooper since 2003. RP 21. His primary duties are “DUI enforcement for moving alcohol affected drivers to reduce fatal and injury collisions,” RP 21, and has extensive training in the area of DUI detection and apprehension, RP 21-22. He has made just over 2,000 DUI arrests in his career, but has stopped many more motorists who were not impaired. RP 22-23. In general, the trooper testified that speeding infractions yield the most DUI arrests for him. RP 23.

The trooper additionally testified that indicators of impairment include:

Certainly the extreme stuff, slurred speech, not standing on their own to the less noticeable things like slight indicators understanding that they have been drinking and evasive about it, the bloodshot, watery eyes, flush face, odor of intoxicants, dexterity. It goes on and on. It’s pretty rare we see all that stuff, but.

RP 23.

On September 4, 2014, at approximately 1:04 a.m., Trooper Bart was working on Division Street in Spokane County, Washington, when he observed a vehicle travelling toward him that appeared to be travelling over the speed limit of 30 miles per hour. RP 23-24. The Trooper’s radar clocked

the vehicle at 41 and 42 miles per hour. RP 24. The trooper turned around to contact the vehicle, and was able to obtain an additional radar reading of 40 miles per hour in the 30 mile per hour zone. RP 24.

The trooper then activated his emergency lights as the truck turned left onto Lacrosse Avenue. The truck continued one block before stopping. RP 24. Trooper Bart directed the driver to stay in his vehicle two times, but Mr. Huntoon, the driver, failed to follow the officer's direction and continued to get out of his vehicle. Mr. Huntoon placed his keys on the steel tool box of the pickup truck, and apologized. RP 25.

Trooper Bart noticed that Mr. Huntoon had bloodshot, watery eyes, and a flushed face. RP 25. Mr. Huntoon also had a stunned or intoxicated looking appearance, consistent with many other DUI defendants the trooper had contacted. RP 25. As the trooper continued to speak with Mr. Huntoon, he noticed the odor of alcohol coming from him. RP 26. Trooper Bart asked Mr. Huntoon how much he had to drink, and Mr. Huntoon told him that he had had two drinks. Mr. Huntoon refused to submit to any voluntary field sobriety tests. RP 26.

Mr. Huntoon was placed under arrest for DUI based on: (1) his speeding, (2) the time of day – 1:00 in the morning, (3) Mr. Huntoon failed to return to the truck when instructed, (4) Mr. Huntoon's placement of the keys on the top of the truck, (5) his facial expression, (6) his bloodshot,

watery eyes, (7) the noticeable odor of intoxicants emanating him, (8) Mr. Huntoon's refusal of the field sobriety tests which indicated to the officer, based on his training and experience, that a person does not believe he is sober enough to pass and (9) Mr. Huntoon's admission to consuming two drinks. RP 27-28, 41. Trooper Bart testified that his arrest decision was based on the totality of the circumstances known to him at the time. RP 40.

The State proffered the Trooper's dash-cam video in support of probable cause, and the Court admitted and reviewed the video. Ex. 3.²

The Court orally ruled on the defendant's motion to dismiss:

The Court had an opportunity to hear the testimony, obviously watch the video that was done.

I would agree that in order to find probable cause, the Court has to look at the totality and the facts and circumstances that were known to the officer at the time of the arrest, that a reasonably cautious person to believe an offense was committed.

In looking over the testimony that the trooper gave, the trooper noted that he was speeding 40 in a 30. That is a violation of the traffic laws. So based on that and [sic] the officer had cause to stop him for the violation of the speeding. The trooper noted that he failed to stop quickly, and that he actually made a turn, failed to follow directions by not remaining in the truck, the odor of alcohol, the flush face, the bloodshot watery eyes, the refusal to do the FS, and the admission to two drinks, obviously with his training and experience looking at the totality of the circumstances, is there enough at this time to determine there's probable cause

² The State has designated Ex. 3 to be transmitted to the Court of Appeals for review.

with the totality of the circumstances? It doesn't have to be bad driving or sloppy driving. It's was there a violation of the traffic laws.

40 in a 30 would be a violation of a traffic law. So at this time, the Court would have to find that there's probable cause for the arrest based on the totality of the circumstances.

RP 54-55.

The matter proceeded to trial, at which time, Trooper Bart testified in substantially the same manner. RP 241-252. During trial, evidence was presented that after Mr. Huntoon was arrested and advised of his implied consent warnings for breath, he gave breath samples of .157 and .156. RP 257, 321-322.

The defendant stipulated to having four prior qualifying offenses for purposes of the jury determining whether he had committed the felony crime of DUI. CP 69. The jury unanimously found the defendant guilty as charged. CP 73; RP 427-429. Defendant timely appealed.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY DETERMINED THAT PROBABLE CAUSE EXISTED TO ARREST THE DEFENDANT FOR DRIVING UNDER THE INFLUENCE; THE STOP WAS NOT PRETEXTUAL.

1. Probable cause existed to arrest the defendant for DUI.

In Washington, challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where

the findings are unchallenged, they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). A trial court's conclusions of law following a suppression hearing are reviewed de novo. *State v. Bailey*, 154 Wn. App. 295, 299, 224 P.3d 852, *review denied*, 169 Wn.2d 1004, 236 P.3d 205 (2010).

Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution, with the officer's background, to believe that a crime has been committed. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979); *State v. Gluck*, 83 Wn.2d 424, 426-27, 518 P.2d 703 (1974). In examining probable cause, the validity of an arrest is determined by objective facts and circumstances. *Beck v. Ohio*, 379 U.S. 89, 96, 13 L. Ed. 2d 142, 85 S. Ct. 223 (1964); *State v. Vanzant*, 14 Wn. App. 679, 681, 544 P.2d 786 (1975). If facts and circumstances within the officer's knowledge are sufficient to convince a person of reasonable caution to believe that an offense has been committed, the arrest is lawful.

To determine whether an officer's belief was reasonable, the court must consider all the facts within the officer's knowledge at the time of the arrest and the officer's special experience and expertise. *Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). The probable cause determination is not a mechanical rule, but rather, requires a consideration of the total facts

of each case, “viewed in a practical, nontechnical manner.” *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 847, 43 P.3d 43 (2002).

Specifically with regard to the crime of driving while under the influence of intoxicating liquor, this court has held that there is no set formula for the determination of probable cause. *Staudenmaier*, 110 Wn. App. at 847.

Mr. Staudenmaier reviews a number of cases and attempts to set a formula for facts necessary to show probable cause, for example: smelling alcohol plus erratic driving plus poor dexterity equals probable cause. *See State v. Smith*, 130 Wn.2d 215, 223, 922 P.2d 811 (1996). He then attempts to show how various vital facts relied upon by other courts are missing from the present case. But there is no “mechanical rule” for establishing probable cause. *Gillenwater*, 96 Wn. App. at 671, 980 P.2d 318. And we will not set one here. We look instead at the facts of each case. *Id.* And the facts of this case support Officer Locati’s determination of probable cause to arrest Mr. Staudenmaier for DUI.

Id.

As correctly observed by the trial court in this case, proof of erratic driving is not required for a determination of probable cause, nor is it required to sustain a conviction for DUI. *State v. Hansen*, 15 Wn. App. 95, 546 P.2d 1242 (1976). Considering the totality of the circumstances, however, the trial court properly determined that probable cause existed for Trooper Bart to arrest the defendant.

Here, defendant has not challenged any of the trial court's findings of fact; therefore, they are verities on appeal. The trial court found the existence of the following facts: "the trooper noted that the defendant was speeding 40 [m.p.h.] in a 30 [m.p.h. zone]... The trooper noted that he failed to stop quickly, and that he actually made a turn, failed to follow directions by not remaining in the truck,³ the odor of alcohol, the flush face, the bloodshot watery eyes, the refusal to do the FS, and the admission to two drinks." RP 54-55.

Defendant argues that because there was no evidence of slurred speech, erratic driving, or impaired body movements the officer lacked probable cause to arrest him for DUI. This is the precise argument that failed in *Staudenmaier*; the lack of some indicators of intoxication does not mean that probable cause does not exist based on the totality of the other facts and circumstances known to the officer. The trial court correctly determined that based on the officer's training and experience, looking at the totality of the circumstances, the officer had probable cause to arrest the defendant.

³ Defendant alleges on appeal that he did not stay in his truck when told to do so by the Trooper because he did not hear "the officer's command until after he had exited his truck." Appellant Br. at 16. This testimony was not heard by the trial court during the motion hearing, but rather was elicited during the defendant's trial testimony. RP 372. The defendant did not testify during the motion hearing, and therefore, this testimony was not before the court when it decided the motion on probable cause. It should not now be considered by this Court on appeal because the trial court made no finding of fact to this effect.

2. The defendant's argument that the stop of his vehicle was pretextual was neither preserved, nor has any merit.

Defendant additionally alleges that “immediately upon trooper Bart having contacted him the investigation became nothing short of “pretextual” in nature,” Appellant Br. at 15, and the Trooper’s observation that the defendant was speeding ten miles per hour over the speed limit in the early morning hours did not allow him to further investigate the crime of DUI. This argument was not briefed or argued to the court below, and is not thoroughly briefed on appeal. CP at *passim*; RP 51-53. This court declines to review arguments that are not sufficiently developed on appeal, or are not the subject of an assignment of error. RAP 10.3(a)(6); *Emmerson v. Weilep*, 126 Wn. App. 930, 939–40, 110 P.3d 214, 218 (2005) (“It is well settled that a party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error”).

The defendant has not demonstrated why this court should entertain any argument that the stop was pretextual when the argument was not made to the court below. It is a fundamental principle of appellate jurisprudence that a party may not assert on appeal a claim that was not first raised at trial. *Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5.

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749, quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

In any event, the stop was not pretextual. An officer engages in a pretextual traffic stop when he stops a citizen, not to enforce the traffic code, but rather to circumvent the warrant requirement and to facilitate investigation of a criminal matter. *State v. Ladson*, 138 Wn.2d 343, 349,

358, 979 P.2d 833 (1999). “When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” *Id.* at 358-59. “The essence of a pretextual traffic stop is that the police stop a citizen not to enforce the traffic code, but to investigate suspicions *unrelated to driving.*” *State v. DeSantiago*, 97 Wn. App. 446, 451, 983 P.2d 1173 (1999) (emphasis added). Even a mixed-motive stop (where an officer’s motive is to investigate both a traffic infraction and another crime) is not pretextual if the officer had a reasonable, articulable suspicion that a driver had committed a traffic infraction and decided that a traffic stop was reasonably necessary to address the suspected infraction to promote traffic safety and the general welfare; an officer’s motivations or interests in another related investigation are irrelevant. *State v. Arreola*, 176 Wn.2d 284, 300, 290 P.3d 983 (2012).

Although the pretext issue was not raised below, Trooper Bart testified that his job as a state trooper is to enforce the traffic code. RP 21-23. His primary duties involved the detection and apprehension of impaired drivers. RP 21. His motive to stop a vehicle for the suspected infraction of speed was not pretextual for an investigation of any other crime, although Trooper Bart testified that he often stops speeders who later turn out to be

impaired drivers. There is no merit to defendant's argument that the stop of his vehicle based on speed was a pretext.

B. NO UNANIMITY INSTRUCTION WAS NECESSARY WHERE THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL OF THE ALTERNATIVE MEANS OF COMMITTING THE CRIME OF DRIVING UNDER THE INFLUENCE.

The crime of driving while intoxicated may be committed by the alternative means of driving while under the influence of intoxicants, or having the statutorily specified percentage of alcohol in the blood or breath, as shown by a prescribed analysis. RCW 46.61.502(1)(a) and 1(c).⁴ *State v. Franco*, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982). In an alternative means case, such as DUI, where a single offense may be committed in more than one way, there must be jury unanimity as to *guilt* for the single crime charged. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Unanimity is not required, however, as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means. *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987); *Franco*, 96 Wn.2d at 823. In reviewing an alternative means case, the court must determine whether a rational trier of fact *could* have found each means of committing

⁴ The two other alternative means for committing the crime of DUI require proof that the defendant's blood concentration of THC was 5.00 or higher, or that the defendant is under the combined influence of or affected by alcohol, marijuana and any drug. RCW 46.61.502(1)(b) and (1)(d). Neither of these alternatives was charged in this case.

the crime proved beyond a reasonable doubt. *Franco*, 96 Wn.2d at 823, citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The State agrees that no unanimity instruction was given in this case requiring the jurors to unanimously agree upon the means of DUI committed by the defendant. CP 65. Therefore, the question is whether the trial record contains sufficient evidence that a reasonable trier of fact could have returned a verdict of guilt on each alternative means of committing DUI.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970

(2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.*

Our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) (this Court defers to the jury's determination regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

At trial, Trooper Bart testified to substantially the same facts as those presented during the motion hearing. He testified to his training and experience as a trooper. RP 242-246. He testified that he is currently assigned to the target zero team in Spokane County, and that he primarily works to detect impaired drivers. RP 246. He testified on the date of the offense at approximately one o'clock in the morning, he observed Mr. Huntoon's vehicle driving ten miles per hour over the speed limit. RP 247.

The trooper testified that Mr. Huntoon travelled approximately a block before yielding to the trooper's emergency lights. RP 248. He testified that Mr. Huntoon did not follow his instructions to stay in his vehicle. RP 248. He testified that Mr. Huntoon said, "I'm sorry. I live here," and put his car keys on the back of his truck. RP 249. The trooper testified that he observed that the defendant had bloodshot, watery eyes, and a flushed face which are indicators of alcohol consumption. RP 250. Trooper Bart testified that while obtaining Mr. Huntoon's information, he was able to smell the odor of alcohol coming from Mr. Huntoon and that Mr. Huntoon told him he had had two drinks. RP 250-251. Mr. Huntoon chose not to perform field sobriety tests. RP 251. The trooper testified that based on all of his observations at this point, he believed Mr. Huntoon was affected by alcohol. RP 252, 274.

Later, Trooper Jon McKee described how the breath test instrument operates, and during his testimony, the trial court admitted the BAC results indicating that the defendant's breath test was .157 and .156.⁵

Mr. Huntoon also testified on his own behalf. On the evening in question, he met up with a friend at The Happy Time bar at approximately

⁵ Before the BAC results were admitted, Trooper Bart testified that he was surprised at the BAC result; that his "experience taught [him] someone at that number, you see more indicators out on the side of the road" but that individuals may be affected by alcohol differently or have different tolerance levels. RP 273.

10 p.m. RP 368. He admitted to drinking two drinks,⁶ and stated that his wife left the bar without him. RP 369. Mr. Huntoon left the bar at about 11:30 p.m. or shortly thereafter and went back to his house with one of his friends. RP 371. His friend was “in no shape” to drive, so Mr. Huntoon drove him home; they stopped at Jack-In-The-Box on their way to his friend’s home. RP 371. He testified he did not see the trooper’s lights at the time of the traffic stop, and he opted not to take the field sobriety tests because he believed that it would just be his word against the trooper’s word, and he did not believe they were fair tests. RP 372.

As indicated above, credibility determinations are solely for the jury. Therefore, it was free to disregard some or all of Mr. Huntoon’s testimony. It was also free to believe the testimony of Trooper Bart, a law enforcement officer with nearly fifteen years of experience, who has arrested 2,000 drunk drivers, and who described in detail his observations of the defendant, and how those observations led him to believe that the defendant was obviously affected by his alcohol consumption.

⁶ Defendant testified that he had two “vodka sevens.” RP 369-370. He testified that he did not know how many ounces of alcohol were in each drink, or if they were “standards” or “doubles.” RP 375.

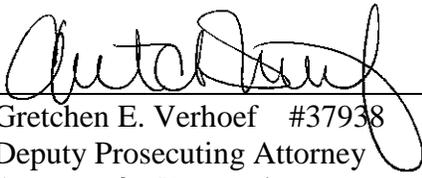
Because sufficient evidence exists supporting both the “affected by” and “legal limit”⁷ means of committing the crime of DUI, there is no unanimity error in the jury’s verdict, and the court did not err in accepting that verdict, finding the defendant guilty, or imposing sentence, as alleged in Defendant’s Assignments of Error 2 and 3.

V. CONCLUSION

The State respectfully requests that this court affirm the lower court and jury verdicts. The trial court did not err in determining that probable cause existed for the trooper to arrest the defendant for driving under the influence of intoxicating liquor. Additionally, substantial evidence existed supporting each alternative means of committing the crime of DUI, and therefore, there was no error with respect to jury unanimity.

Dated this 21 day of December, 2016.

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⁷ Defendant does not assign error on appeal to the sufficiency of the evidence supporting the conclusion that the defendant operated a motor vehicle and, within two hours of operating a motor vehicle had a breath test of .08 or more.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JERRY D. HUNTOON,

Appellant.

NO. 34359-6-III

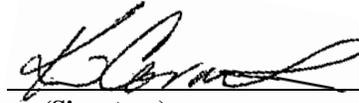
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 21, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Bevan Maxey
hollye@maxeylaw.com

12/21/2016
(Date)

Spokane, WA
(Place)


(Signature)